Taxi & Limousine Comm'n v. W.R.

OATH Index No. 2503/17 (July 14, 2017)

In fitness proceeding, taxi driver was found to have tested positive for the ingestion of marijuana. However, under TLC's rules, respondent's drug test should not be viewed as "failed" because his ingestion of marijuana was legal under the New York State Compassionate Care Act and implementing regulations. Moreover, under the Compassionate Care Act, respondent is afforded protections for his certified medical use of marijuana. Accordingly, there is no basis to conclude based upon respondent's legal ingestion of marijuana that he is unfit to hold a TLC license. The petition against respondent should be dismissed.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
TAXI AND LIMOUSINE COMMISSION
Petitioner
-against-
W.R.
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a fitness proceeding commenced by the Taxi and Limousine Commission ("TLC") against respondent, W.R.[1], a holder of a TLC Driver License, pursuant to Administrative Code section 19-505(l) and the Taxi and Limousine Commission Rules, title 35, chapters 68 and 80 of the Rules of the City of New York. Admin. Code § 19-505(1); 35 RCNY

[1] Respondent's name has been redacted from publication due to the sensitive medical and mental health information discussed herein. *See, e.g., Dep't of Correction v. M.C.*, OATH Index No. 2343/15 at 1 n.1, 15-17 (Mar. 17, 2016) (respondent's name redacted because decision contained information about sensitive mental health issues); *Human Resources Admin. v. Anonymous*, OATH Index No. 2596/10 at 1 n.1, 9-10 (Jan. 31, 2011) (respondent's name removed from decision that contained detailed discussion of his physical and mental health)*; Admin. for Children's Services v. J.M.*, OATH Index No. 3350/09 at 1 n.1, 5-6 (Apr. 5, 2010) (withholding respondent's name from a decision with extensive discussion of respondent's mental health).

§§ 68-14(a)(4), 80-14(e) (Lexis 2017). Petitioner alleges that respondent is unfit to retain his TLC Driver License (license number 5112699) because he tested positive for the use of marijuana.

At trial petitioner relied upon documentary evidence. Respondent testified and also submitted documentary evidence. It is undisputed that respondent's drug test showed that he ingested marijuana. However, because respondent obtained the marijuana legally, as a medical marijuana patient certified by the New York State Department of Health pursuant to the New York State Compassionate Care Act, Pub Health Law, Art. 33, Title V-A (Lexis 2017), petitioner has not established that his drug test is "failed . . . as a result of illegal drug use," as required by Rule 68-14(a)(4). Accordingly, petitioner did not prove that respondent is unfit to hold a TLC Driver License. The petition should be dismissed, and respondent's license should not be revoked.

ANALYSIS

Petitioner seeks the revocation of respondent's TLC Driver's License due to a positive drug test. Licensees are required to undergo annual drug testing, at their expense, for drugs and controlled substances as defined by section 3306 of the Public Health Law. 35 RCNY § 80-14(d) (Lexis 2017). If a driver tests positive for a controlled substance, his or her license may be revoked following a hearing. 35 RCNY § 80-14(e); Admin. Code § 19-505(1) (Lexis 2017). A failed drug test for a controlled substance is one which is "a result of illegal drug use." 35 RCNY § 68-14(a)(4). Marijuana is classified as a controlled substance under schedule I of section 3306 of the Public Health Law. The use of medical marijuana for patients certified by the New York State Department of Health is legal under the Compassionate Care Act, enacted by New York State in 2014.

There is no doubt that respondent's drug test showed that he had ingested marijuana. *See Fung v. Daus*, 45 A.D.3d 392 (1st Dep't 2007). Petitioner presented an affidavit (Pet. Ex. 2) from Nataliya Krainyk, a toxicologist employed by Laboratory Corporation of America Holdings ("LabCorp"), and an accompanying toxicology report. The documents establish that respondent appeared for an annual drug test at a testing site in Middle Village on May 24, 2017, and

provided a urine specimen which was sealed in a container with a tamper-proof seal and assigned a unique identification number and bar code. A day later the specimen was delivered to the LabCorp laboratory in Raritan, New Jersey and certified as being sealed when received by the lab. The sample first underwent an immunoassay test to screen for any controlled substances. The test revealed a presumptive positive result for the marijuana metabolite. The specimen then underwent confirmatory testing through gas chromography/mass spectrometry ("GC/MS"), which revealed the presence of the marijuana metabolite at 1479 nanograms per milliliter. This exceeded legal cut-off level for GC/MS testing of 15 nanograms per milliliter. Petitioner also introduced a signed statement by the medical review officer who reviewed the drug test result and verified the accuracy of the chain of custody form contained in the toxiciology report (Pet. Ex. 4).

Respondent did not dispute the drug test. Rather, he credibly testified, and introduced corroborating documentary evidence showing, that he has been taking marijuana in capsule form several times a day, starting about April 2017, pursuant to New York State's medical marijuana program, administered by the New York State Department of Health under the Compassionate Care Act (Tr. 7-18; Resp. Exs. A, B).

The Compassionate Care Act authorizes the medical use of marijuana to treat certain serious qualifying conditions: cancer, HIV infection or AIDS, amyotrophic lateral sclerosis ("ALS"), Parkinson's disease, multiple sclerosis, damage to the nervous tissue of the spinal cord with intractable spasticity, epilepsy, inflammatory bowel disease, neuropathies, Huntington's disease, chronic pain, severe nausea, seizures, and severe or persistent muscle spasms. The statute permits a patient who has a "serious condition," including neuropathies, to receive a certification for the use of medical marijuana by a doctor who is registered with the New York State Department of Health's Medical Marijuana Program. Pub. Health Law § 3360, 3361. A certified medical use of marijuana does not include smoking. Pub. Health Law § 3360(1). In order to receive a patient certification, the patient must be under a doctor's continuing care for a serious medical condition and must, in the doctor's professional opinion, be likely to receive therapeutic or palliative benefit from treatment with medical marijuana for the serious condition. Pub. Health Law § 3361. Upon approval of the certification, the Department of Health issues registry identification cards to certified patients. Pub. Health Law § 3363. Such certified

patients can legally purchase medical marijuana at dispensaries that are registered with the Department of Health. Pub. Health Law § 3365.

The legislative findings and intent to the 2015 amendments to the Compassionate Care Act note the need "to provide appropriate medical marihuana for certain patients whose serious condition is progressive and degenerative or for whom delay in the patient's certified medical use of marihuana poses a serious risk to the patient's life or health . . . ." 2015 N.Y. Laws ch. 416 § 1. Additionally, the New York State Commissioner of Health and the Superintendent of the New York State Police certified on January 6, 2016 that the Compassionate Care Act "can be implemented in accordance with public health and safety interests." *https://www.health.ny.gov/regulations/medical_marijuana/docs/certification.pdf* (accessed July 10, 2017).[2]

The Compassionate Care Act confers legal protections upon certified medical marijuana patients for their use of marijuana. Pub. Health Law § 3369 ("Protections for the medical use of marihuana"). Section 3369(1) provides that "Certified patients . . . shall not be subject to penalty in *any* manner, or denied *any* right or privilege, including but not limited to . . . disciplinary action by a business or occupational or professional licensing board or bureau, solely for the certified medical use . . . of marihuana." (emphasis added). It does not, however, bar "enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance." Section 3369(2), "Non-discrimination," states that, "Being a certified patient *shall* be deemed to be having a 'disability' under article fifteen of the executive law (human rights law)" (emphasis added). Article 15 of the New York State Human Rights Law prohibits discrimination in employment and licensing on the basis of disability. Executive Law § 296(1)(a).

Respondent credibly explained that he is 59 years old and suffers from diabetes and neuropathies. He has been certified as a medical marijuana patient by the Department of Health pursuant to the Compassionate Care Act, due to severe debilitating pain from his diabetes and his neuropathies (Tr. 10, 16). He has a registry identification card from the New York State

[2] The New York State Department of Health has promulgated extensive and detailed regulations further implementing the program, 10 NYCRR Part 1004 *et seq.*, encompassing practitioner registration, patient certification, caregiver registration, requirements for registered organizations which grow or sell medical marijuana, manufacturing requirements for approved medical marijuana products, testing requirements, security requirements, reporting requirements, and the like.

Department of Health (Resp. Ex. B), as well as a patient certification (Resp. Ex. A), which sets forth: his name; the name, address, and New York State practitioner license number of his medical doctor; his medical condition; and his dosing recommendations. The patient certification indicates that his "severe debilitating condition" is "neuropathies," and shows as "associated condition(s) or symptom(s)" "severe or chronic pain resulting in substantial limitation of function." The dosing recommendations are for a one month supply of marijuana in capsule form, at a prescribed dosage, starting April 4, 2017, with the certification expiring a year later (Resp. Ex. A). Respondent's doctor signed the certification, attesting that he is a licensed practitioner in good standing in New York State, is currently registered with the New York State Department of Health to issue the certification, possesses an active Drug Enforcement Administration certification, and is caring for respondent and believes that respondent is "likely to receive therapeutic or palliative benefit from the primary or adjunctive treatment with medical marijuana" (Resp. Ex. A). Respondent takes the state-issued certification to a state-approved dispensary in Queens to purchase the medical marijuana capsules (Tr. 17).

Respondent testified that he has not driven a taxicab since he started taking medical marijuana (Tr. 18). Indeed, he has not driven a taxicab for a living for about seven years, due to his health issues, as well as time he spent caring for his now-deceased father (Tr. 20, 21). He does not feel that he is currently able to drive a taxicab, due to persistent depression and chronic pain from the neuropathies. Respondent wants, however, to maintain his TLC license so that he is able to resume driving once he is ready (Tr. 20, 21). He was told when he went for the drug test that a doctor's prescription "would be accepted by the TLC" (Tr. 10).

At issue is whether respondent should be found unfit and have his TLC Driver License revoked because of his legally authorized use of medical marijuana. TLC Rule 80-14(e) permits the Commission to revoke a license when "the results of a drug test are positive." The rule does not define the meaning of a "positive" result. However, TLC Rule 68-14(a)(4), "Special Procedures-Fitness Revocation Hearings," upon which petitioner here relies (Pet. Ex. 1), provides that a Licensee will be notified to appear as a respondent for a fitness hearing if the Chairperson believes that a licensee "is not fit to hold a license . . . based upon . . . [a] failed drug test as a result of illegal drug use or failure to comply with drug testing procedures." Hence, a drug test is not "failed" if it is results from legal drug use, such as when a licensee has a valid

prescription for the drug. This is consistent with the TLC's practice in virtually every drug testing case – acknowledged here – that if a licensee tests positive for a controlled substance, that drug test result will be reversed if a prescription is sent to the Doctors Review Service, which is TLC's vendor, and the Doctors Review Service determines that ingestion of the prescribed substance is compatible with the drug test results (Tr. 26). Indeed, TLC acknowledged that Doctors Review Service finds "acceptable" a prescription for Marinol, which is synthetic marijuana approved by the Federal Drug Administration ("FDA") (Tr. 26). *See also* https://www.fda.gov/newsevents/publichealthfocus/ucm421168.htm (accessed July 11, 2017) (noting that Marinol and another drug called "Syndros" have been FDA-approved for "therapeutic uses" in the United States, including anorexia associated with weight loss in AIDS patients). *See Taxi & Limousine Comm'n v. Ilizirov*, OATH Index No. 2677/14 (Sept. 3, 2014), *adopted*, Oct. 21, 2014 (petitioner did not establish unfitness of for-hire driver who tested positive for marijuana but had been prescribed Marinol).

Petitioner maintains, however, that a positive drug test for medical marijuana should be treated differently. In doing so, petitioner relies upon the practice of the Doctors Review Service, which has stated that it does not "approve" prescriptions for medical marijuana from any state, except Arizona (Tr. 27).[3] Petitioner believes that the Doctors Review Service relies upon the fact that marijuana is not FDA approved and is classified as a controlled substance under federal law. It is true, certainly, that marijuana is listed as a controlled substance under state law, *see* Public Health Law § 3306, as well as under the federal Controlled Substances Act, 21 U.S.C. § 812 (Lexis 2017). It is also true that the FDA has not approved "a marketing application for a drug product containing or derived from botanical marijuana," although it is aware that such products "are being used for a number of medical conditions including, for example, AIDS wasting, epilepsy, neuropathic pain, treatment of spasticity associated with multiple sclerosis, and cancer and chemotherapy-induced nausea." https://www.fda.gov/newsevents/publichealthfocus/ucm421168.htm (accessed July 11, 2017).

Petitioner's position ignores, however, that respondent obtained the medical marijuana for which he tested positive legally, pursuant to state statute and regulations. Respondent was

[3] Petitioner could not explain why Arizona appears to be treated differently.

approved by the New York State Department of Health as a certified medical marijuana user under the Compassionate Care Act. His patient certification is akin to a prescription, except that it is authorized by both the physician who signs the form and by the State of New York, which issues the certification. The state-issued certification makes it legal for respondent to purchase medical marijuana from a registered dispensary. Thus, Rule 68-14(a)(4), which conditions a finding of unfitness upon a "failed drug test as a result of *illegal* drug use," is inapplicable.

The fact that the FDA has not approved a marketing application for botanical marijuana (as opposed to synthetic marijuana, which it has approved) does not make respondent's ingestion of marijuana under New York State law any less legal. The State Legislature made very clear in enacting the Compassionate Care Act that certified patients were not to be penalized in "any" manner or denied "any" right or privilege solely because of their certified medical use of marijuana.

Further, the Compassionate Care Act deemed status as a certified medical marijuana patient a disability under the State Human Rights Law, affording further protections to an employee or licensee. It appears that respondent would also be protected by New York City's Human Rights Law, which generally provides greater protections than the State Human Rights Law. *See Romanello v. Sanpaolo, S.p.A.*, 22 N.Y.3d 881, 884 (2013) ("The City [Human Rights Law] . . . affords protections broader than the State [Human Rights Law"); *Albunio v. City of New York*, 16 N.Y.3d 472, 477-78 (2011) (City Human Rights Law must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible"); *see also* Admin. Code § 8-107 (Lexis 2017) (prohibiting discrimination on the basis of disability); Admin. Code § 8-102(16) (defining "disability" as "any physical, medical, mental or psychological impairment, or a history or record of such impairment"); Admin. Code § 8-102(16)(c) ("disability" as a protected class shall not apply to person who is "currently engaging in the *illegal* use of drugs") (emphasis added) (Lexis 2017).

Petitioner also seems to assert that medical botanical marijuana should be treated differently because it is classified as a controlled substance under both federal and state law. The issue, however, is not whether marijuana is considered a controlled substance. There are many controlled substances for which a TLC licensee will test positive that will result in a "passed" drug test, because they were legally prescribed – such as morphine, codeine, and amphetamines.

The issue instead is whether the use of a controlled substance, detected on a drug test, is illegal. Under the Compassionate Care Act, respondent's use of medical marijuana was legal. Further, it appears that under applicable law, he cannot be denied a license to drive a taxicab solely because of his status as a certified medical marijuana patient by the New York State Department of Health.

It should be stressed that this fitness proceeding is solely predicated upon respondent's drug test results, which showed his use of marijuana. Under the TLC's rules, a driver is prohibited from driving a taxicab while under the influence of drugs. 35 RCNY § 80-14(b). Petitioner retains the ability to require a driver to be tested for drugs upon reasonable suspicion that he or she used a drug that makes him or her unfit to operate a vehicle safely. 35 RCNY § 80-14 (c). Petitioner may also bring a fitness proceeding against any driver whom it believes is driving while impaired by drugs or alcohol. *See* TLC Rule 68-14(1)(a). However, this is not such a proceeding. Indeed, as respondent credibly testified that he has not driven a taxicab after becoming a certified medical marijuana patient, there is no factual predicate for a claim that he is driving while impaired by drugs.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent tested positive for the use of a controlled substance.

2. Respondent's use of the controlled substance, medical marijuana capsules, was legal under the Medical Marijuana Program administered by the New York State Department of Health pursuant to the New York State Compassionate Care Act.

3. Respondent may not be deemed unfit to hold a TLC Driver License because of his legal ingestion of medical marijuana.

RECOMMENDATION

As discussed above, because respondent's use of medical marijuana was legal, there is no basis under the TLC rules to find him unfit to hold a TLC Driver License. Revocation of his

TLC Driver License solely because of his status as a certified medical marijuana patient by New York State would be inconsistent with state and city law, and contrary to the TLC rules which specify that a failed drug test is the result of illegal drug use. The petition against respondent should be dismissed.

Faye Lewis
Administrative Law Judge

July 14, 2017

SUBMITTED TO:

MEERA JOSHI
Commissioner

APPEARANCES:

STAS SKARBO, ESQ.
Attorney for Petitioner

W.R.
Self-Represented